

NORTHERN ALASKA ENVIRONMENTAL CENTER, ET AL.

IBLA 99-59

Decided September 18, 2000

Appeal from a Record of Decision of the Alaska State Director, Bureau of Land Management, approving a right-of-way for an electric power transmission line. FF091732.

Affirmed.

1. Environmental Quality: Environmental Statements--Rights-of-Way: Applications

The Council on Environmental Quality regulations provide at 40 C.F.R. § 1506.5(c) that the contractor preparing an EIS be chosen solely by the lead agency in order to avoid any conflict of interest. It is a violation of that regulation for BLM to approve three contractors and allow the right-of-way applicant to select the contractor. Such a violation, however, is a de minimis error if the objectivity and integrity of the NEPA process is otherwise maintained.

2. Environmental Quality: Environmental Statements--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Applications

NEPA requires that an EIS consider alternatives to the proposed action and Federal agencies are required to use, to the fullest extent possible, the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. Where BLM has identified and carefully assessed the reasonable alternatives, the action will be affirmed.

3. Environmental Quality: Environmental Statements

Executive Order 11990 requires agencies to avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practical

alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. Where new construction in wetlands cannot be avoided, all practicable measures to minimize harm to wetlands which may result from such use must be assured. In making these findings, an agency may consider economic, environmental, and other pertinent factors and need not prepare a separate document that explicitly illustrates compliance with Executive Order 11990 so long as the project's consistency with that order can reasonably be inferred from the record.

4. Federal Land Policy and Management Act of 1976: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976

Section 503 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1763 (1994), authorizes issuance of rights-of-way, such as roads and overhead transmission lines, in common, where practical, to minimize adverse environmental impacts and the proliferation of separate rights-of-way. It also provides for the designation of right-of-way corridors. Under 43 C.F.R. § 2806.1, the designation of rights-of-way corridors does not preclude the granting of separate rights-of-way over, upon, under or through, the public lands where the authorized officer determines that confinement to a corridor is not appropriate.

APPEARANCES: Thomas S. Waldo, Esq., Kimberly A. Owens, Esq., Juneau, Alaska, for appellants; Lisa Del Compare, Esq., Anchorage, Alaska, for the Bureau of Land Management; Peter Haller, Esq., Leslie R. Schenk, Esq., Seattle, Washington, for Golden Valley Electric Association.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Northern Alaska Environmental Center, Alaska Wilderness Recreation and Tourism Association, Arctic Audubon Society, and Alaska Center for the Environment have appealed the September 14, 1998, Record of Decision (ROD) issued by the State Director, Alaska State Office, Bureau of Land Management (BLM), approving a right-of-way grant (FF091732) to Golden Valley Electric Association (GVEA) for the construction, operation, and maintenance of a 230 kV capacity electric transmission line between Healy and Fairbanks, Alaska. Following a full analysis of seven alternatives and a no-action alternative, the State Director approved the grant for

the Rex/South route. 1/ The approved right-of-way route for the project, denominated the Northern Intertie Project, crosses approximately 97 miles, 34 of which embrace lands administered by BLM, including a 27-mile stretch on Fort Wainwright Military Reservation, 59 miles on lands managed by the State of Alaska, and 4 miles across privately-owned lands. The 150-foot wide, 34-mile long right-of-way approved by BLM contains 618 acres of Federal land.

In the ROD, the State Director stated at page 1-2:

The line will transmit the power generated in Healy by the Healy Clean Coal Project and that generated in South Central Alaska. The substation in Healy will be modified to accommodate the increased power generation. A new substation will be constructed at the load center in south Fairbanks, the terminus for the line. A 40 megawatt Battery Energy Storage System (BESS) will also be constructed at the terminus site. The existing Intertie is a 138 kV transmission line which operates at near capacity year-round. Construction of a second intertie will meet the increased demands for power, and improve the transmission reliability of electric service by providing separate transmission lines.

In an October 4, 1999, order, the Board denied appellants' motion for stay and GVEA's motion for expedited consideration. 2/

On appeal, appellants contend that BLM's selection of the Rex/South route as the site for the right-of-way violates the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332 (1994), and its implementing regulations because (1) BLM allowed GVEA to select the contractor to prepare the draft environment impact statement (DEIS) and the final environmental impact statement (FEIS), (2) BLM lacked sufficient capability to evaluate GVEA's assertions on technical electrical engineering issues, and (3) BLM failed to consider all reasonable alternatives. They further allege that the choice of the Rex/South route improperly ignored the wetlands protection requirements of Executive Order (E.O.) 11990, 42 U.S.C.

1/ The Rex/South Route is described in the ROD at page 4 as running "northeast from Healy past Walker Dome. It then turns generally north and passes along the east side of Clear Air Force Station. The Rex/South route would then parallel the Tanana River on the south side until crossing the Tanana River at Goose Island and connecting to the Wilson substation [a new substation in South Fairbanks]."

2/ On pages 16-18 of its answer in this case, BLM argues that Arctic Audubon Society and Alaska Center for the Environment lack standing to appeal the decision in this case. Appellants rebutted those arguments at pages 2-5 of their reply brief. We find that Arctic Audubon Society and Alaska Center for the Environment each have standing to appeal.

§ 4321 (1994), and conflicted with the mandates of section 503 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1763 (1994), advocating the utilization of rights-of-way in common to the extent practical.

We will first address appellants' alleged NEPA violations. NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). It requires only that an agency take a "hard look" at the environmental effects of any major Federal action, and "not that environmental concerns trump all others." Swanson v. United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996); see Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 353 (1989).

An EIS must fulfill the primary mission of NEPA, which is to ensure that a Federal agency, in exercising the substantive discretion afforded it to approve or disapprove a project, is fully informed regarding the environmental consequences of such action. See 40 C.F.R. § 1500.1(b) and (c); Natural Resources Defense Council v. Hodel, 819 F.2d 927, 929 (9th Cir. 1987); San Carlos Apache Tribe, 149 IBLA 29, 46 (1999).

In deciding whether an EIS has fulfilled the NEPA mission, courts have stated that they will not "fly-speck" the document and hold it insufficient on the basis of inconsequential, technical deficiencies, but instead will employ a rule of reason such that the question becomes whether an EIS contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences. Swanson v. U.S. Forest Service, *supra* at 343; State of California v. Block, 690 F.2d 753, 761 (9th Cir. 1982). Every impact of every action need not be assessed, but only the impact or effect on the environment. Association of Public Agency Customers, Inc. v. Bonneville Power Administration, 126 F.3d 1185, 1186 (9th Cir. 1997).

Appellants' initial NEPA argument is based on Council on Environmental Quality (CEQ) regulation 40 C.F.R. § 1506.5, which allocates the burden of gathering and evaluating environmental information. 40 C.F.R. § 1506.5(c) provides that

any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any appearance of conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project.

Appellants contend that this regulation was violated because by virtue of an agreement between BLM and GVEA the latter was to submit a list of potential consultants to prepare an EIS, BLM would review that list, approve one or more consultants for preparing the EIS, and GVEA would select one of the consultants approved by BLM to prepare the EIS. The agreement further provided that GVEA obtain, from the consultant selected, a signed disclosure statement provided by BLM. ^{3/}

Pursuant to that agreement, GVEA submitted to BLM the names of three contractors, Dames & Moore, Mangi Environmental, and Greystone. BLM advised GVEA that it approved all three. GVEA selected Dames & Moore.

Appellants argue that the agreement violated the regulatory requirement "that the contractor be chosen solely by the lead agency" (SOR at 18), and that in allowing GVEA to select the contractor, BLM delegated excessive authority. (SOR at 22.)

BLM admits that 40 C.F.R. § 1506.5(c) required it to select the contractor to prepare the EIS. BLM contends that it met this responsibility by approving the three contractors submitted by GVEA and, more particularly, "by obtaining, evaluating and ultimately approving three contract proposals." (BLM Answer at 21.) BLM states that it "takes full responsibility for the use of Dames & Moore as contractor." (BLM Answer at 22.)

BLM further argues that the important issue is whether the objectivity and integrity of the NEPA process have been preserved. BLM asserts that, even if it failed in its responsibility under 40 C.F.R. § 1506.5(c), it ensured objectivity by making all decisions as to scope and content. BLM contends that it extensively reviewed the DEIS, noted deficiencies in data and analyses, and provided direction to the contractor, Dames & Moore. (BLM Answer at 25.) It states that it also made all major decisions and Dames & Moore representatives reported to BLM to receive direction. (BLM Answer at 28.)

[1] In *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991), the Toledo Port Authority hired a consulting firm to prepare an EIS for an airport expansion project and submitted its proposal to the Federal Aviation Administration (FAA). FAA chose not to prepare the EIS itself. Having made that choice, the court held, the FAA "was obligated to pick a contractor itself, and not to delegate the responsibility." *Id.* at 202. The court found that the Port Authority, not the FAA, selected the contractor and that the FAA "concurred" in the selection. The court ruled that concurrence was not the same as "choosing a consultant of one's

^{3/} June 17, 1997, Memorandum of Agreement between BLM and GVEA at 2. (Statement of Reasons (SOR), Exh. 19.)

own," and that "[b]y failing to select the consultant that prepared the environmental impact statement, the FAA violated CEQ regulations." Id. at 202.

In the case before us, we find that BLM similarly violated the CEQ regulation. GVEA selected and submitted three consultants for BLM's approval. As it states in its answer, BLM evaluated the project proposals of each of these "and approved all three as qualified to prepare an EIS for the project." (BLM Answer at 21.) Thus, the choice of a contractor remained with GVEA. However, 40 C.F.R. § 1506.5(c) specifically states that it "is the intent of these regulations that the contractor be chosen solely by the lead agency * * * to avoid any conflict of interest." (Emphasis added.) Because the regulation does not address "review" or "approval" of or "concurrence" in the selection of a consultant, BLM did not meet its responsibility under it.

This error, however, is de minimis if the objectivity and integrity of the NEPA process is otherwise maintained. Citizens Against Burlington Inc., supra at 202. BLM asserts that it ensured the objectivity of the process by making all decisions as to scope and content. On the other hand, appellants claim that GVEA had a strong preference for Dames & Moore because the two firms had a long-standing business relationship. However, the mere existence of a long-standing business relationship does not undermine the integrity of the NEPA process. Appellants also cite an internal Dames & Moore e-mail, which they claim shows that Dames & Moore "had a strong interest in keeping its customer [GVEA] happy." (SOR at 20.) However, appellants failed to quote the remainder of that e-mail which indicated that Dames & Moore worked closely with BLM and sought approval from BLM regarding their approach. "BLM has a copy of our proposed impacts table. I would like to get their feedback on whether this approach is what they want to see. Do they want something more? or less?" (SOR, Exh. 21.) Appellants' allegations do not support a lack of objectivity on the part of Dames & Moore.

We believe the record shows that the objectivity and integrity of the NEPA process have been preserved and that appellants have not established a basis for overturning BLM's decision.

We turn to appellants' second argument, which is that the environmental evaluation process was compromised because BLM lacked the technical expertise to properly evaluate electrical engineering data presented by GVEA. Appellants base their argument on CEQ regulation 40 C.F.R. § 1507.2 which provides in relevant part:

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include the use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it.

Citing the list of preparers in the EIS, appellants charge that BLM had no one with engineering expertise assigned to the project. When technical engineering questions arose during the evaluation process, appellants assert, they were referred to Steven Haagenson, GVEA's Manager of Engineering Services. Appellants contend that Haagenson drafted responses to public comments and essentially represented GVEA and was the paramount authority on electrical engineering issues. (SOR at 25-26.)

Appellants note that Northern Alaska Environment Center retained an independent consulting electrical engineer, William M. Stephenson, to review GVEA's positions on electrical engineering issues. By letter of July 20, 1998, to BLM's team leader for the project, Stephenson filed his comments on the FEIS. (SOR, Exh. 41.) ^{4/} In those comments, Stephenson offered a number of critiques, disagreements, and numerous questions on the need for the project, its costs and cost effectiveness. Stephenson suggested that various alternatives may not have been seriously analyzed and that the costs of the project were not justified. Stephenson asserted that a cost/benefit analysis was required with respect to anticipated outages and offered to provide such an analysis for BLM if BLM would furnish outage data for analysis.

In their SOR at 30, appellants charge that BLM lacked the capability to review complex, technical engineering issues, that it persistently refused to obtain the engineering help it needed, and that Stephenson's commentary (his July 20, 1998, letter) demonstrates a "fatal defect" in the EIS which placed

a \$16-25 million handicap on all the developed corridor alternatives for purposes of increasing liability without even making an attempt to determine the value of that reliability. Nor is it reasonable to reject co-located lines or a single line on reliability grounds without determining the value, if any, of the difference in reliability.

While the value of increased reliability from the line, as opposed to the BESS, has never been calculated, the record does contain enough information to show that the value is extremely small. Golden Valley's own lead engineer — Steve Haagenson — wrote in response to a comment on the FEIS, "Reliability benefits are partially from application of the BESS and

^{4/} In a "Declaration" dated Feb. 22, 1999, Stephenson stated that he had reviewed the DEIS and the FEIS for the Northern Intertie Project. He concluded that "the EIS does not support the need for a second intertie, a new intertie corridor, or a new terminus at the South Fairbanks substation." (SOR, Exh. 47.)

to a much lesser degree from the addition of a second transmission line." Exhibit 42 at 1 (emphasis added). This extraordinary admission, made after the FEIS was complete, refutes the EIS's repeated arguments that a separate second line, with an extra 60-mile loop around [Fairbanks], was needed for purposes of reliability.

(SOR at 35.)

Appellants note further that the BESS would prevent many more outages than the new transmission line and that for this reason the EIS "was extremely misleading" in "lumping the BESS and the second line together in the explanation of reliability." *Id.* at 36. Appellants state that BLM had "no expert capable of sorting out the disagreements between Stephenson and Haagenson," *i.e.* of "sufficient capability to evaluate the work of others" under 40 C.F.R. § 1507.2. (SOR at 37.)

BLM admits that questions involving technical engineering matters were referred to GVEA for response but contends that this was proper and that appellants failed to raise concerns with GVEA's responses. (BLM Answer at 30.) Further, BLM argues that the NEPA process does not require the assessment of questions involving the impact of engineering options on costs, benefits, or on the reliability of energy delivery. *Id.* at 32-33.

GVEA argues in its answer that appellants have provided only four documents in support of their contention that any time technical engineering questions came up in the environmental review process those questions were referred to GVEA's Haagenson. Those documents, it charges, show in two cases that Haagenson was merely responding to questions posed by BLM consultants, that in another case Haagenson summarized an interagency meeting attended by 10 people, and in the last Haagenson provided to a BLM contractor GVEA's input to comments on the DEIS. Appellants' response is that BLM is entitled to rely on engineering information submitted by GVEA, but that it must have the capability to evaluate it.

GVEA cites three reports in the record which it asserts shows support for reliance by BLM on the expertise of others concerning electrical engineering and other matters relating to the project. Those reports, two prepared by Decision Focus, Inc., and one by the North American Electric Reliability Council, include an economic feasibility report, a reliability assessment, and a report concluding that a second intertie had a substantial excess of benefits over costs. (GVEA's Answer, Exhs. 2, 7, and 8.)

In their reply brief at 16, appellants were unimpressed, quoting from their SOR at 29: "In short, while these reports may provide useful background information for an engineer qualified to scrutinize them, BLM's reliance on these reports to obviate the agency's independent responsibility to evaluate Golden Valley's engineering work is misplaced." (SOR at 29.)

Finally, GVEA offered that the BLM manager assigned to the project

had experience on numerous other electrical transmission line projects on BLM-administered lands. The BLM manager on this Project attended specialized training titled, "The Electrical System Short Course," which covered transmission line issues such as need for reliability, electrical grids, corridors, wire stringing, and the issues which must be addressed as a land manager. During this course, site visits were conducted to several 500kV lines currently under construction to gain first hand exposure to transmission line issues.

(GVEA's Answer at 14.) Appellants did not challenge this representation by GVEA.

Appellants contend that on a project like the one in question engineering expertise is required to develop alternative routes and that the regulation requires that BLM have "sufficient capability" to evaluate the work regardless of whether it is an environmental discipline. They state that BLM "rejected or handicapped alternatives that would avoid routes through undeveloped areas primarily on grounds of reliability." (SOR at 31.) Appellants state that, according to Stephenson's evaluation, Fairbanks, which is presently served by a single transmission line from Healy, does not suffer from an electric reliability problem. Also, Stephenson questioned the use by BLM of a "single contingency analysis" ^{5/} on the basis that it was "unable to shed any light whatsoever on whether investments make economic sense." (SOR, Exh. 41 at 10.)

BLM asserts that it did not use the single contingency analysis to determine if investments made economic sense, noting that the economics of the project were for determination by GVEA, but that the analysis was completed to determine the effectiveness of different system configurations and "the analysis supported the need to bring the termination of the Northern Intertie to the system load center in south Fairbanks." (BLM Answer at 31.) Thus, the economics of the project were not an issue for resolution by BLM in the NEPA process. As GVEA pointed out in its Answer at 16: "[T]he Alaska Legislature made a determination in 1993 after years of study by the state and others that a second transmission line from Healy to Fairbanks was necessary for the economic welfare of the citizens of the state" and it appropriated \$43,200,000 for that purpose. (GVEA Answer, Exh. 3.) While appellants dispute whether the legislature mandated a second line, it is clear that all subsequent studies and planning assessed

^{5/} "Single contingency analysis is typically used to determine the effectiveness of different system configurations. Single contingency analysis takes one device or line out of service and looks at the remaining system's ability to carry loads (or meet customer demands)." (DEIS, Appendix B at B-1.)

the feasibility of a second intertie. The statement of project purpose and need included in the Executive Summary of the DEIS lists as one of three goals: "Improve the reliability of electric service and provide a second line from Healy to Fairbanks." (DEIS, ES-2.) The fact that Stephenson's assessment is that there is no reliability problem, and that from an economic standpoint, the project should not go forward, is not persuasive. As pointed out in the FEIS, GVEA retained outside electrical engineering contractors for the design of the project and multiple entities, such as the Alaska Energy Authority, the North American Electric Reliability Council, and the Electric Power Research Institute, as well as engineers from Alaska Electric Generation and Transmission, Anchorage Municipal Light & Power, Chugach Electric Association, Homer Electric Association, the Institute of Electrical and Electronic Engineers, Matanuska Electric Association, Seward Electric System, and the University of Alaska Fairbanks Electrical Engineering Department all provided input through independent reviews and suggested requirements for the project. (FEIS 4-4, 4-5.)

Appellants' position is that BLM "had no expert capable of sorting out the disagreements between Stephenson and Haagenson." (SOR at 37.) However, the regulation cited by appellants, 40 C.F.R. § 1507.2, which states that "the using agency shall itself have sufficient capacity to evaluate what others do for it," does not mandate such a capability. Moreover, the comments provided by Stephenson were submitted by letter dated July 20, 1998, following issuance of the FEIS. They were not provided during the 60-day comment period on the DEIS. The comments received during that time received extensive consideration in the FEIS. See FEIS at 4-1 through 4-47.

The Federal Register preamble adopting final regulations, which included 40 C.F.R. § 1507.2, responded to a comment expressing concern that the regulation would require each agency to employ "the full range of professionals including geologists, biologists, chemists, botanists and others to gain sufficient capability for evaluating work prepared by others." 43 Fed. Reg. 55988 (1978). The response was: "This is not the Council's intention. Agency staffing requirements will vary with the agency's mission * * *." Id.

Appellants do not challenge the representation of GVEA and BLM that the project staff included a person with specialized training in electrical transmission line issues. In addition, the interagency working group also included engineering expertise. As BLM points out, it worked with an interagency team which included representatives from the U.S. Department of Agricultural Rural Utilities Service (RUS), the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, and the State of Alaska Departments of Fish and Game and Natural Resources. BLM represents that RUS had an engineering staff and initiated and was a lead agency for the environmental assessment and continued to participate in development and review during the EIS process. BLM states that RUS had an obligation to bring any engineering issues to the attention of the interagency team.

Based on our review of the record in this case, we find no violation of 40 C.F.R. § 1507.2, as charged by appellants.

Next, appellants argue that BLM failed to consider at least three reasonable alternatives for detailed discussion in its environmental review. The alternatives proposed by appellants include (1) a more direct link between the Gold Hill and Wilson (South Fairbanks) substations, (2) termination of the intertie at Gold Hill, and (3) upgrading the existing power line.

BLM and GVEA answer that various alternatives were considered and that the reasons for selecting the preferred alternative and rejecting the others are copiously documented in the DEIS and FEIS. BLM notes that its role was to decide whether to grant the transmission power line right-of-way, not to determine whether that transmission line was necessary, since questions of public need are determined by public service commissions. (BLM Answer at 36.)

[2] NEPA requires that an EIS consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1994). Regulations of the CEQ provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Further, agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). Agencies need not discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. Headwaters, Inc. v. BLM, Medford District, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); Roosevelt Campobello International Park Commission v. U.S. Environmental Protection Agency, 684 F.2d 1041, 1047 (1st Cir. 1982). In a leading case on the requirement to discuss alternatives, Judge Leventhal stated that "the alternatives required for discussion are those reasonably available * * *." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). Judge Leventhal continued: "In the last analysis, the requirement as to alternatives is subject to a construction of reasonableness * * *." Id. at 837.

In reviewing permitting decisions, courts have recognized that Federal agencies are required to consider the needs and purposes of an applicant in determining what constitutes a reasonable alternative:

An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving its goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's

wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.

Citizens Against Burlington, Inc. v. Busey, 938 F.2d at 199. In addition, CEQ has stated that the agency should not "disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives." CEQ Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34267 (1983).

The first alternative appellants claim BLM failed to consider was a more direct link between the Gold Hill substation on the west side of Fairbanks and the South Fairbanks substation. Appellants assert that only 6 miles separate the Gold Hill substation from the South Fairbanks substation but that instead a 60-mile northern loop around the entire city of Fairbanks was chosen. Appellants also contend that undergrounding a direct line was feasible but disregarded.

GVEA explains that only three alternatives studied by BLM (the existing intertie route, the North Route, and Option A, following the railroad right-of-way) were routed to the Gold Hill substation, but that a determination was made for those three alternatives to loop around the perimeter of the city of Fairbanks rather than continuing the line directly across the city of Fairbanks to the South Fairbanks substation. ^{6/} GVEA asserts that the looped route avoids almost all residential and populated areas and, in fact, does not require 60 miles of new construction. Instead, the loop around Fairbanks which was studied, GVEA states, would have involved only about 10 miles of new construction in a new right-of-way, 10 miles of construction along an existing 69 kV line, and 40 miles using existing transmission lines. GVEA provides evidence in the form of a map designated as ATTACHMENT 4 to its answer that shows that a direct line from the Gold Hill substation to the South Fairbanks substation would have to cross almost in its entirety areas designated as "Residential/Populated Areas" or "Areas to Avoid if Possible" due to their use for such things as airports or wildlife refuges.

Appellants criticize ATTACHMENT 4 because of the "many relevant factors it does not show." (Appellants' Reply at 21.) They claim that it does not show the density of residential development between Gold Hill and South Fairbanks, the number of residences, the location of existing lines that could be utilized with no additional impacts to residential areas, what gaps in existing lines could be linked to create a continuous connection, or where the line might be placed underground to avoid undesirable

^{6/} The selected route, the Rex/South route, does not utilize the Gold Hill substation. The Rex/South route proceeds directly to the South Fairbanks substation. See note 1, *supra*; FEIS, Fig. 1.

impacts. Appellants seek to impose on BLM the burden they bear. They must show that a direct link between the two substations was a reasonable alternative. However, they have not identified any specific direct link for BLM to consider. In the absence of such a proposal, we find that the record, including GVEA's ATTACHMENT 4, clearly supports a determination to consider the looped route for those three alternatives, rather than a direct link between the two substations.

BLM also generally considered and rejected undergrounding portions of the intertie because of technical and environmental problems associated with such construction. In addition, transition stations would be required at each end of the underground cable to connect it to overhead lines. In residential areas, such transition stations might require larger rights-of-way for construction purposes. (DEIS at 2-21.)

Appellants have failed to meet their burden of showing that a direct line between the two substations was a reasonable alternative. BLM's determination not to consider such an alternative in detail is not a NEPA violation.

Appellants also allege that BLM refused to consider any alternatives that would terminate at the Gold Hill substation. Both BLM and GVEA point out that appellants are incorrect in that allegation and that, as part of the environmental assessment process beginning in 1994, various alternatives terminating at the Gold Hill substation were considered and determined not to be feasible. (BLM's Answer to Appellants' Reply at 12, n.8; GVEA's Response to Appellants' Reply at 2.)

Moreover, as explained in the DEIS at 2-1:

Five screening criteria were developed to assist the BLM in determining which EA alternatives should be carried forward for detailed analysis in the EIS and which alternatives were not "reasonable and feasible." The screening criteria, alternative routes eliminated from consideration, and alternatives selected to be carried forward in the EIS were presented to the agencies and public for comment following the scoping process. The first three criteria represent characteristics that a transmission line must have:

Alternatives must meet the express purpose and need of the proposed project, including providing a reliable supply of electricity to the GVEA load center in southern Fairbanks.

Any alternative terminating at the Gold Hill substation in western Fairbanks would not meet the purpose and need to provide a reliable supply of electricity to the South Fairbanks substation. As stated above, Federal agencies have a duty to consider the purposes and needs of an applicant in determining what constitutes a reasonable alternative under NEPA.

Appellants contend that BLM has misstated certain facts about reliability. It contends that a line terminating at the Gold Hill substation would provide greatly improved reliability over the present situation because the vast majority of reliability benefits in the Northern Intertie project result from construction of the BESS, not from the new transmission line. It asserts that BLM erred when it contended in its answer at page 41 that "the BESS would not eliminate, or even greatly reduce, reliability concerns."

We disagree. As pointed out by GVEA, the Northern Intertie will provide a permanent source of electric transmission, while the BESS is a different type of facility offering a different type of reliability. GVEA cites to the DEIS at 1-9, which states:

One benefit of the BESS is its provision of 40 MW of spinning reserves by storing energy. Spinning reserves are a buffer or extra generation that is already up and running and able to respond immediately if a generator or transmission line were to trip off line. A generator typically is run year-round to supply spinning reserves, resulting in high fuel costs. The BESS gives GVEA time to start up local generation in Fairbanks to replace lost power; however, a major limitation of the BESS is that it can only supply up to 40 MW for 20 minutes. It is only intended to be used as a temporary source of emergency power while alternative power sources are activated.

It is clear that the Northern Intertie and the BESS will compliment each other. As GVEA states at page 3 of its response to appellants' reply, "[i]t makes no difference which is more important than the other. They are both important and they are both necessary."

BLM reasonably determined not to develop in detail alternatives terminating at the Gold Hill substation because such alternatives did not meet the purposes and needs for the project.

Finally, appellants claim that BLM failed to examine in detail the reasonable alternative of upgrading the existing transmission line. The DEIS discussed upgrading the existing transmission line, but determined that it did not meet the purposes and needs for the project. (DEIS at 2-22 and 2-23.) In addition to improving the reliability of GVEA's system, a factor that appellants condemn as not providing a reasonable basis for rejecting the upgrading alternative, one of the other stated seven purposes for the proposed project is to "[p]rovide for continued transmission capability between Healy and Fairbanks during future reconstruction of the existing intertie." (DEIS at 1-5.)

We find that increased reliability itself is a sufficient basis for not pursuing the alternative of upgrading the existing line. In discussing the upgrading of the existing intertie, the DEIS noted that if the upgraded line failed, all three Healy power sources would be cut off from Fairbanks

and 140 MW of power would be lost, likely resulting in a complete blackout, which, depending on the time of year and length of the blackout, could pose life-threatening risks to customers. (DEIS at 2-22 and 2-23.) Certainly, it was reasonable to reject for further examination the upgrading of the existing intertie based on a lack of increased system reliability. In addition, appellants completely ignore the substantial increase in costs associated with upgrading the intertie to accommodate the higher voltage.

Additionally, continued capability during future reconstruction also provides an independent basis for not studying in detail the upgrading of the existing intertie. As stated in the DEIS at 1-9:

The existing 138 kV transmission line between Healy and Fairbanks was constructed in 1967 and needs to be renovated in the next 10 to 20 years. Reconstruction of the existing intertie is expected to include an upgrade from 138 kV to 230 kV and realignment of the route in limited areas. It is estimated that the project would require five years to complete, with the intertie out of service up to seven months a year (AEA [Alaska Energy Authority], 1991). * * * With the Northern Intertie in place, the existing intertie could be periodically taken out of service while the Northern Intertie supplies enough power to meet the energy demands of GVEA's customers.

Construction of the Northern Intertie will allow GVEA the flexibility to renovate the existing intertie, while still providing the necessary power for its increasing customer base.

Appellants have failed to show that upgrading the existing intertie was a reasonable alternative that should have been discussed in detail by BLM. The record shows that BLM rigorously explored and evaluated all reasonable alternatives, and that it documented the reasons for rejecting eliminated alternatives, as it was required to do under 40 C.F.R. § 1502.14(a). We conclude that none of the alternatives urged by appellants is a reasonable alternative that should have been examined in depth by BLM. Accordingly, there is no violation of NEPA.

Next, appellants allege that BLM selected the Rex/South route, despite the existence of several practicable alternatives that would have a lesser impact on wetlands. In doing so, appellants charge that BLM violated E.O. 11990, "Protection of Wetlands," 42 Fed. Reg. 26961 (May 24, 1977), amended by E.O. 12608, 52 Fed. Reg. 54617 (Sept. 9, 1987), reprinted in 42 U.S.C. § 4321 (1994).

The relevant portions of E.O. 11990 provide:

Sec. 1. (a) Each agency shall provide leadership and shall take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural

and beneficial values of wetlands in carrying out the agency's responsibilities for (1) acquiring, managing, and disposing of Federal lands and facilities; and (2) providing Federally undertaken, financed, or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

Sec. 2. * * * [E]ach agency * * * shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practical alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors.

* * * * *

Sec. 4. When Federally-owned wetlands or portions of wetlands are proposed for * * * right-of-way or disposal to non-Federal public or private parties, the Federal agency shall (a) reference in the conveyance those uses that are restricted under identified Federal, State, or local wetlands regulations; and (b) attach other appropriate restrictions to the uses of properties by the grantee or purchaser and any successor, except where prohibited by law; or (c) withhold such properties from disposal.

Section 7(b) defines "new construction" as including "draining, dredging, channelizing, filling, diking, impounding and related activities, and any structures or facilities begun or authorized after the effective date of this Order."

The BLM guidelines implementing E.O. 11990, Wetland-Riparian Area Protection and Management; Policy and Protection Procedures; Final Guidelines, 45 Fed. Reg. 7889-7895 (Feb. 5, 1980), outline the policy for the management of wetlands:

- A. Avoid the long- and short-term adverse impacts associated with the destruction, loss, or degradation of wetland-riparian areas.
- B. Avoid construction in wetland-riparian areas whenever there is a practical alternative.
- C. Preserve and enhance the natural and beneficial values of wetland-riparian areas which may include constraining or excluding those uses that cause significant, long-term ecological damage.

D. Include practical measures to minimize harm in all actions causing adverse impacts to wetland-riparian areas.

45 Fed. Reg. at 7891 (Feb. 5, 1980).

The BLM guidelines direct BLM to analyze alternatives, "fully considering economic, environmental, and other pertinent factors" and select the desired action that "will cause the least amount of degradation to the total environment." Id. at 7892.

The DEIS includes a comprehensive wetlands survey as Appendix D, and the FEIS summarizes the impacts on wetlands as follows:

Based on the proposed construction measures and the timing of construction, none of the routes are [sic] expected to affect wetlands beyond the selective clearing of trees and tall vegetation. Wetland functions are not expected to be adversely impacted since the soil will not be disturbed and root systems will be left intact, except for small areas at tower locations where the pilings are driven. Draining or filling (other than pile placement) will not occur in wetland areas. Over time some cleared areas may experience some degradation of shallow permafrost. The results of degradation of permafrost could include localized subsidence and a greater degree of saturation, or areas of standing water in some areas.

(FEIS at 2-11.)

It is appellants' position that BLM was required to select the alternative that would have the least impact on wetlands. They charge that the Rex/South route "will involve construction activities, draining and filling and pile placement across 1,245 acres of wetland * * * more wetlands acreage than all but two of the seven proposed alternatives." (SOR at 50.)

BLM responds that E.O. 11990 does not apply to the project because it does not involve construction in wetlands within the definition of E.O. 11990. BLM's position is based on its reading of the definition of "new construction," set forth above. It states that the definition does not encompass the cutting of vegetation or trees or the degradation of permafrost. It also states that unlike a highway or underground pipeline, "an overhead power line is not a continuous structure that occupies all wetlands in its path or right-of-way." (BLM Answer at 50.)

We must reject BLM's argument. The DEIS acknowledges that pile placement in wetland areas will involve draining and filling. In addition, the fact that an overhead power line is not a continuous structure does not negate the fact that the towers erected along the right-of-way are themselves "structures," within the meaning of the definition of "new construction." Thus, E.O. 11990 is applicable. However, BLM argues in the alternative that, if E.O. 11990 is applicable, it complied with its requirements.

[3] In Carmel-By-The-Sea v. U.S. Department of Transportation, 123 F.3d 1142, 1167 (9th Cir. 1997), the court held that E.O. 11990 requires a finding of "no practical alternative," when new construction in wetlands cannot be avoided, and an inclusion of "all practicable measures to minimize harm to wetlands which may result from such use." A practical alternative is an alternative capable of attainment within relevant, existing constraints. National Wildlife Federation v. Adams, 629 F.2d 587, 591-92 (9th Cir. 1980). An agency may consider economic, environmental, and "other pertinent factors" in making these findings and need not prepare a separate document that explicitly illustrates compliance with E.O. 11990, so long as the project's consistency with the E.O. can reasonably be inferred from the record. Surfrider Foundation v. Dalton, 989 F. Supp. 1309, 1330 (S.D. Cal. 1998).

Appellants assert that each of the seven alternatives studied by BLM were practicable because they were reasonable, feasible, and beneficial. According to appellants, BLM was, therefore, "required to select the alternative that would have the least impact on wetlands." (SOR at 50.)

Such a position is unacceptable. The E.O. allows Federal agencies to consider "economic, environmental and other pertinent factors" in determining whether practicable alternatives exist. Under appellants' theory, BLM would be required to ignore all pertinent factors, except the impact on wetlands and select the alternative with the least impact on wetlands, regardless of its other environmental impacts. The BLM guidelines cited above provide that selection of the desired action should be based on consideration of the action that would cause the least amount of degradation to the "total environment."

Although appellants' claim that section 2 of E.O. 11990 requires an express finding that no practicable alternative to the South/Rex route exists, we disagree. The case law indicates that a separate document is not necessary, when the project's consistency with the E.O. can be reasonably inferred from the case record. Surfrider Foundation v. Dalton, *supra* at 1330. Another court stated that, while the preparation of a separate report detailing the findings of the agencies would have facilitated review, it found the record "adequate to determine the agencies complied with the type of analysis required by the Executive Orders [E.O. 11990 and E.O. 11988, 'Floodplain Management.']" Sierra Club v. Hassell, 636 F.2d 1095, 1100 (5th Cir. 1981).

We find that the record contains the necessary discussion of the practicality of the various alternative routes within the framework of economic, environmental, and other pertinent considerations. The FEIS summarizes the extent of the involvement of wetlands and the impact on them on the alternative routes. BLM determined that none of the alternatives posed significant impacts to wetlands. The reasons for selecting the Rex/South route are set forth in the ROD at pages 12-13. Although no separate document details BLM's consideration of compliance with E.O. 11990, we find the record adequate to determine that there is "no practicable alternative to such construction."

Appellants also argue that BLM failed to take all practicable measures to minimize harm to wetlands. Appellants' solution is to select a route that crosses less wetland acreage. However, such a solution is not a mitigation measure to minimize harm. In selecting the Rex/South route, BLM devised numerous mitigation measures. See DEIS 2-10 through 2-16; FEIS 2-5 through 2-8; ROD 5-9. As BLM stated in the ROD at 13:

The analysis has shown there are no significant impacts to floodplains and wetlands. The COE [Corps of Engineers] and the USF&W [United States Fish and Wildlife Service] were members of the interagency working group for this project and have helped identify impacts and develop mitigation related to floodplain and wetlands concerns.

In order to demonstrate error appellants would have to show that mitigation measures were not considered or were insufficient. Appellants have made no such showing. A difference of opinion does not suffice to establish error, nor will we substitute appellants' judgment for BLM's. See Blue Mountains Biodiversity Project, 139 IBLA 258, 266-67 n.9 (1997).

Finally, appellants charge that selection of the Rex/South route violated section 503 of FLPMA, 43 U.S.C. § 1763 (1994), which provides in relevant part:

In order to minimize adverse environmental impacts and the proliferation of separate rights-of-way, the utilization of rights-of-way in common shall be required to the extent practical, and each right-of-way or permit shall reserve to the Secretary concerned the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way granted pursuant to this Act.

Appellants contend that by not utilizing two existing rights-of-way, the existing intertie or the railroad, BLM violated this provision. (Appellants' Reply at 52-53.)

BLM states that neither FLPMA nor BLM policy guidelines required or even encouraged BLM to select a route utilizing the existing intertie corridor because the existing intertie route is not a "designated right-of-way corridor" within the meaning of 43 C.F.R. § 2800.5(a). 7/ BLM points out

7/ That regulation defines a "designated right-of-way corridor" as "a parcel of land either linear or areal in character that has been identified by law, by Secretarial Order, through the land use planning process or by other management decision as being a preferred location for existing and future right-of-way grants and suitable to accommodate more than 1 type of right-of-way or 1 or more rights-of-way which are similar, identical or compatible."

that approval of rights-of-way involves discretion, and that in designating right-of-way corridors and determining whether to confine rights-of-way to such corridors, it is obliged to consider national and state land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices. (Answer at 60; Answer to Reply at 29.)

[4] Section 503 of FLPMA, 43 U.S.C. § 1763 (1994) requires the use of rights-of-way in common where such use would be "practical." Departmental regulation 43 C.F.R. § 2800.0-2(c) provides that one objective of the issuance of rights-of-way is to "[p]romote the utilization of rights-of-way in common with respect to engineering and technological compatibility, national security, and land use plans." In addition, 43 C.F.R. § 2806.1 specifically provides that "[t]he designation of [rights-of-way] corridors shall not preclude the granting of separate rights-of-way over, upon, under or through, the public lands where the authorized officer determines that confinement to a corridor is not appropriate." The use of existing corridors is encouraged, but the choice for location of additional rights-of-way is clearly discretionary. See Paul Herman, 146 IBLA 80, 105 (1998). It is also clear that under FLPMA approval of rights-of-way is a matter of Departmental discretion. El Paso Electric Co., 146 IBLA 145, 149 (1998), and cases there cited. Where the grant or denial by BLM of a right-of-way is challenged, the proponent must demonstrate by a preponderance of the evidence that BLM's decision is unreasonable. Id.

The discussion of alternatives in the EIS fully explains and supports the Rex/South route. Even assuming the existence of designated right-of-way corridors, BLM still maintains discretion over the location of additional rights-of-way. Appellants have not shown that the selection of the Rex/South route was in violation of section 503 of FLPMA.

To the extent not discussed herein, appellants' other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

